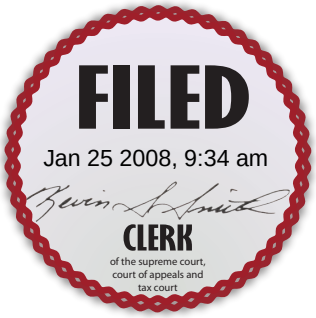

ATTORNEY FOR APPELLANT:

HILARY BOWE RICKS
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

MICHAEL GENE WORDEN
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

WILLIAM JOHNSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0705-CR-417
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Jose Salinas, Judge
Cause No. 49G17-0610-FD-194271

January 25, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

William Johnson challenges his convictions for Class C felony battery and Class D felony strangulation. Johnson also appeals his six-year sentence. We affirm.

Issues

Johnson raises multiple issues on appeal, which we restate as:

I. whether there was sufficient evidence to support his Class C felony battery conviction;

II. whether the trial court abused its discretion in sustaining the State's hearsay objections;

III. whether the trial court abused its discretion in considering the aggravating and mitigating circumstances in sentencing Johnson; and

IV. whether his six-year sentence is appropriate in light of the nature of the offense and the character of the offender.

Facts

During the evening of October 8, 2006, Johnson and his wife, A.J., got into an argument about religion. The argument escalated to physical violence. Johnson pinned A.J. against a wall, then grabbed and threw her to the ground. She hit the coffee table during the fall. When she got to her feet, Johnson grabbed her in a chokehold position and forced her back to the ground. A.J. testified that this action "completely blocked off" her ability to breathe. Tr. p. 16. While on the ground, Johnson shoved three of his fingers down her throat, again obstructing her breathing. A.J. testified that the next thing she remembers was attempting to use the phone to call for help. Johnson stopped her and slammed her face into the floor. Johnson received defensive wounds from A.J.'s

attempts to pull away his arms. She also bit him on the wrist as he was removing his fingers from her mouth. A.J.'s three-year old son was in the couple's apartment during the altercation.

A.J. eventually called 911. Police arriving at the scene found Johnson outside and A.J. inside, crying and shaking. The investigating officer observed a large contusion on the left side of her face and several lacerations on her bottom lip. An ambulance transported A.J. to Community North Hospital in Indianapolis. Her father arrived on the scene to care for her son. Officers arrested Johnson.

On October 9, 2006, the State charged Johnson with Class D felony strangulation, Class A misdemeanor domestic battery, and Class A misdemeanor battery. The State amended the information on October 27, 2006, and November 2, 2006, adding charges of Class D felony domestic battery in the presence of child and Class C felony battery. The trial court heard evidence on March 30, 2007, and found Johnson guilty of Class D felony strangulation and Class C felony battery.[1] This appeal followed.

Analysis

I. Sufficiency of the Evidence

When reviewing the sufficiency of the evidence we must consider only the probative evidence and reasonable inferences supporting the conviction. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). "It is the fact-finder's role, not that of appellate courts,

[1] The trial court also found that the Class A misdemeanor domestic battery and Class A misdemeanor battery charges were "proven" rather than finding Johnson "guilty" for double jeopardy reasons. Tr. p. 191. The trial court only sentenced Johnson for the Class D felony strangulation and Class C felony battery convictions.

to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction." Id. When confronted with conflicting evidence, we must consider it "most favorably to the trial court's ruling." Id. We must affirm the conviction unless "'no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." Id. The evidence need not overcome every reasonable hypothesis of innocence and is sufficient if an inference may reasonably be drawn from it to support the conviction. Id. at 147.

Johnson contends that the trial court erred in finding that the State had proven serious bodily injury sufficient to support a Class C felony battery conviction. "Serious bodily injury" is defined as "bodily injury that creates a substantial risk of death or that causes: (1) serious permanent disfigurement; (2) unconsciousness; (3) extreme pain; (4) permanent or protracted loss or impairment of the function of a bodily member or organ; or (5) loss of a fetus." Ind. Code § 35-41-1-25. "Whether bodily injury is 'serious' has been held to be a matter of degree and therefore a question reserved for the factfinder." Young v. State, 725 N.E.2d 78, 82 (Ind. 2000) (citations omitted). Appellate courts exercise "considerable deference on a matter as judgmental as whether a bodily injury was 'serious.'" Davis v. State, 813 N.E.2d 1176, 1178 (Ind. 2004). Such deference is not complete. See id. (holding that evidence victim suffered lacerated lip, knee abrasion, and broken pinky finger, and was not given any prescription pain medication, did not establish serious bodily injury). There is, however, no bright line between what is "bodily injury" and what is "serious bodily injury." Id.

Johnson argues that because the evidence indicates A.J. was unconscious only very briefly and did not suffer any permanent loss of an organ or bodily function, that her injuries cannot be classified as serious. He also contends that A.J. did not suffer extreme pain. We disagree. Although A.J. testified that she was unsure whether she lost consciousness, the State's medical expert testified that she probably did. Yet, sufficient evidence to support a finding of serious bodily injury exists even without a definitive finding of unconsciousness. A.J. suffered extreme pain during the beating. Her testimony rated the pain of having her face slammed into the floor as a "10" on the scale of 1-10, more painful than a c-section, and "one of the worst pains I have ever felt." Tr. p. 20. Emergency room physicians prescribed Vicodin for her pain. The extreme swelling and trauma to her left eye following the beating impaired her vision. A.J.'s ability to swallow and talk also was impaired during the weeks following the incident. Johnson calls into question A.J.'s testimony about these subsequent effects, but we do not assess witness credibility or reweigh evidence on appeal. See Drane, 867 N.E.2d at 146.

Despite Johnson's arguments that Davis is analogous to this case, we find the sets of facts distinguishable. A.J.'s injuries are clearly more severe than the lacerated lip, knee abrasion, and broken pinky finger the victim suffered in Davis. Physicians treating the victim in that case recommended Tylenol or Advil for the pain and did not issue any prescription strength pain medication. Nor was a potential or brief loss of consciousness at issue in Davis. This evidence is clearly sufficient to establish that A.J. suffered serious bodily injury and support the Class C felony escalation for the battery conviction.

II. Hearsay Objections

Johnson argues the trial court erred when it sustained the State's hearsay objections to certain portions of his testimony. Johnson was attempting to testify regarding past statements made by A.J. that he contends would have supported his theory of self-defense. He testified that A.J. was the aggressor in each instance, but the State objected to hearsay testimony at three points during his testimony when he relayed what A.J. had said.

Johnson did not make any argument or present an offer of proof following any of the three sustained objections. By failing to make an offer of proof, he did not properly preserve this issue for appeal and the issue is waived. Ind. Evidence Rule 103(a)(2); Dylak v. State, 850 N.E.2d 401, 408 (Ind. Ct. App. 2006), trans. denied. Waiver notwithstanding, we find that the trial court did not abuse its discretion in sustaining the State's objection to A.J.'s out-of-court statements. A trial court has broad discretion in ruling on the admissibility of evidence. Bentley v. State, 846 N.E.2d 300, 304 (Ind. Ct. App. 2006), trans. denied. We will reverse a ruling only for an abuse of discretion. Id. The statements by A.J. were hearsay and did not fit into any exceptions, even considering the assertion of self-defense.

"[E]vidence introduced by a defendant to show his apprehension of the victim must imply a propensity for violence on the part of the victim." Brand v. State, 766 N.E.2d 772, 780 (Ind. Ct. App. 2002), trans. denied. The three statements by A.J. related to disagreements with Johnson, but did not constitute threats of violence to Johnson or her own propensity for violence. A.J. made a statement a few days after a physical

altercation that Johnson "deserved it and had it coming." Tr. p. 140. The second hearsay statement that Johnson contends should have been admitted is A.J.'s statement during an argument that she had proof of his infidelity. The third contested statement is vague, but again seems to imply that on the night of the incident A.J. told Johnson she knew of or had proof of his infidelity. These statements do not show a propensity of violence on behalf of the victim. Moreover, both parties testified that the argument resulting in the convictions stemmed from a disagreement about religion and not infidelity. Johnson has not demonstrated that these excluded statements should have been allowed or that they had any effect on his theory of self-defense.

III. Aggravating and Mitigating Circumstances

Johnson argues the trial court abused its discretion in considering the aggravating and mitigating factors when sentencing him. Our supreme court has provided an outline for the respective roles of trial and appellate courts under the 2005 amendments to Indiana's sentencing statutes. See Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007). First, a trial court must issue a sentencing statement that includes "reasonably detailed reasons or circumstances for imposing a particular sentence." Id. Second, the reasons or omission of reasons given for choosing a sentence are reviewable on appeal for an abuse of discretion. Id. Third, the weight given to those reasons, i.e. to particular aggravators or mitigators, is not subject to appellate review. Id. Fourth, the merits of a particular sentence are reviewable on appeal for appropriateness under Indiana Appellate Rule 7(B). Id.

In the trial court's oral sentencing statement, the trial court outlined its reasons for assigning the particular aggravators and mitigators. The trial court identified Johnson's lack of remorse, the impact on A.J. and her child, and Johnson's inability to control his aggressive behavior as aggravating factors. The trial court acknowledged Johnson's military service as mitigating, but stated it would be taken "lightly." Tr. p. 218.

Johnson contends the trial court improperly considered his lack of remorse as an aggravator because he had maintained his innocence. Even in maintaining his innocence and claiming self-defense, however, it was still clear that Johnson inflicted serious injuries to his wife. He did not express remorse or concern for her condition or for the trauma to her young son who was in the home during the beating and has begun to act out. As to Johnson's arguments that a lack of remorse should only be given a "slight weight," we do not reweigh the factors here. App. Br. p. 14.

Johnson also contends that the trial court failed to consider his lack of criminal history as a mitigator. Our review of the transcript indicates that the trial court acknowledged and recognized Johnson's lack of criminal history during the sentencing hearing after a discussion with both attorneys regarding the criminal history. This is not a situation where the trial court was unaware of or completely ignored defendant's criminal history. Rather, the trial court declined to give this factor mitigating weight. "Trial courts are not required to give significant weight to a defendant's lack of criminal history." Stout v. State, 834 N.E.2d 707, 712 (Ind. Ct. App. 2005) (citations omitted), trans. denied. To the extent that the trial court ought to have acknowledged Johnson's

lack of criminal history as mitigating, we still conclude that his sentence is appropriate as discussed in the next part of this opinion.

Finally, Johnson contends the trial court failed to consider his post-traumatic stress disorder ("PTSD") as a mitigating factor. Our supreme court has stated that there is a need "for a high level of discernment when assessing a claim that mental illness warrants mitigating weight." Covington v. State, 842 N.E.2d 345, 349 (Ind. 2006). Factors to consider in weighing the mitigating force of a mental health issue include the extent of the inability to control behavior, the overall limit on function, the duration of the illness, and the nexus between the illness and the crime. Id. Johnson claimed to have been suffering from PTSD, but failed to provide the trial court with any expert testimony, medical records, or other evidence regarding this condition, its extent, any limits on his function, or how it relates to the crime. The trial court did not err in not considering defendant's PTSD as mitigating.

Johnson argues on appeal that these improper considerations warrant revision of his sentence. We disagree and find that the trial court did not abuse its discretion in sentencing Johnson. Having concluded the trial court acted within its discretion in sentencing Johnson, we now assess whether his sentence is inappropriate under Indiana Appellate Rule 7(B) in light of his character and the nature of the offense. See Anglemyer, 868 N.E.2d at 491.

IV. Appropriateness

Although Rule 7(B) does not require us to be "extremely" deferential to a trial court's sentencing decision, we still must give due consideration to that decision.

Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We also understand and recognize the unique perspective a trial court brings to its sentencing decisions. Id. "Additionally, a defendant bears the burden of persuading the appellate court that his or her sentence is inappropriate." Id.

The trial court sentenced Johnson to six years for the Class C battery conviction, with two years suspended on probation and two years for the Class D strangulation, with one year suspended. The sentences were to run concurrently. The total sentence of six years is two years more than the advisory and two less than the maximum for a C felony. See I.C. § 35-50-2-6(a).

Johnson brutally beat his wife, strangling her and repeatedly slamming her face into the floor of their apartment. While Johnson inflicted this pain on his wife, her three-year old son was in the small apartment. We find that the violent nature of this crime does not merit reduction of the sentence. Nor does Johnson's character merit any adjustment of the sentence. Although Johnson does not have a criminal record, he admitted to using cocaine and marijuana in the past and this was not the first incidence of violence against A.J. Johnson did not express any remorse for his crime. He instead blamed the victim and asserted that he was defending himself, while the photographs of A.J.'s injuries paint a starkly different picture. Like the trial court, we also commend Johnson's service to his country. His military service, however, cannot negate the violence he has brought into his home and inflicted on his family. We cannot find that a six-year sentence is inappropriate considering the nature of offense and the character of the offender.

Conclusion

We affirm Johnson's convictions. The trial court did not abuse its discretion in sentencing Johnson and his six-year sentence is not inappropriate. We affirm.

Affirmed.

SHARPNACK, J., and VAIDIK, J., concur.